

**SUPPLEMENTAL
DEPOSITION OF H.H. ROBERTS**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

DAVID DAVIS,

Plaintiff,

A rectangular stamp with the word "COPY" in bold, uppercase letters. To the left of the word is a small square containing the letter "C".

vs.

CASE NO. 3:06-CV-0054-VPM

CITY OF PHENIX CITY, ALABAMA,

et al.,

Defendants.

* * * * *

DEPOSITION OF H.H. ROBERTS, taken pursuant to
stipulation and agreement before Shannon M.
Williams, Certified Court Reporter and Commissioner
for the State of Alabama at Large, in the offices of
City Hall, 601 12th Street, Phenix City, Alabama, on
Tuesday, November 6, 2007, commencing at
approximately 11:16 a.m. EST.

* * * * *

APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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ALSO PRESENT:

Cole Dugan
David Davis
Wallace Hunter

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1 STIPULATIONS

2 It is hereby stipulated and agreed by and
3 between counsel representing the parties that the
4 deposition of H.H. ROBERTS is taken pursuant to the
5 Federal Rules of Civil Procedure and that said
6 deposition may be taken before Shannon M. Williams,
7 Certified Court Reporter and Commissioner for the
8 State of Alabama at Large, without the formality of
9 a commission; that objections to questions other
10 than objections as to the form of the questions need
11 not be made at this time but may be reserved for a
12 ruling at such time as the deposition may be offered
13 in evidence or used for any other purpose as
14 provided for by the Federal Rules of Civil
15 Procedure.

16 It is further stipulated and agreed by and
17 between counsel representing the parties in this
18 case that said deposition may be introduced at the
19 trial of this case or used in any manner by either
20 party hereto provided for by the Federal Rules of
21 Civil Procedure.

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H.H. ROBERTS

The witness, having first been duly sworn or affirmed to speak the truth, the whole truth and nothing but the truth, testified as follows:

EXAMINATION

BY MR. WOODLEY:

Q. Mr. Roberts, I think you know by now, my name is Tom Woodley. I'm counsel for Mr. David Davis in this lawsuit against the city, Chief Hunter, and yourself. You're aware of that?

A. I'm aware of that.

Q. And you had your deposition taken earlier in this case, correct?

A. I have.

Q. Let me go through a couple of preliminaries just to make sure we're still on the same wavelength. You've now been placed under oath again so you're obligated to tell the complete and full truth. Do you understand that?

A. I understand.

Q. If at any time you don't understand or hear one of my questions, please stop me immediately and I will be more than happy to rephrase or repeat that question to ensure that you do, in fact, understand my question. Do you understand that?

1 A. I understand.

2 Q. You have to wait until I finish my question
3 before you begin your answer so that this
4 distinguished court reporter can take down all of
5 the words that we say today. Do you understand
6 that?

7 A. I understand.

8 Q. Is there any reason today, medication or
9 otherwise, that you might be in any way impaired in
10 understanding my question and responding to my
11 questions?

12 A. No.

13 Q. Okay. Let me invite your attention to the
14 binder of exhibits which you have in front of you.
15 And Mr. McKoon has a full set of these exhibits as
16 well. Exhibit Number 1 is the notice of depositions
17 that we served concerning this round of depositions
18 in the case. And you have been designated as the
19 city's Rule 30(b)(6) witness to give knowledgeable
20 and informed testimony in certain subject matter
21 areas. Are you aware of that?

22 A. I'm aware of that.

23 Q. Let me invite your attention to page 2 of
24 the Notice of Deposition. Paragraph one is an area
25 where you have been designated as a Rule 30(b)(6)

1 witness for the city, and that states as follows:
2 "All actions, agendas, minutes, notes, notices,
3 memoranda, summaries, correspondence, media reports,
4 e-mails, and other documents which relate in any way
5 to city employees that have addressed or spoken to
6 city council members in any public meetings or
7 conferences of the city council for the period
8 January 1, 2001 to the present."

9 See where it says that?

10 A. I do.

11 Q. Are you prepared today to give testimony on
12 that subject?

13 A. I am.

14 Q. Paragraph two states as follows: "All
15 actions, memoranda, correspondence, e-mails, notes,
16 notices, media reports, and other documents which
17 relate in any way to any communications in writing
18 or verbal that any city employees have had with city
19 council members outside of public meetings for the
20 period January 1, 2001 to the present."

21 See where it says that?

22 A. I do.

23 Q. Are you prepared to give testimony on that
24 subject as well?

25 A. I am.

1 Q. Going to paragraph four, it provides as
2 follows: "All actions, memoranda, correspondence,
3 e-mails, notes, notices, grievances, warnings,
4 counseling forms, reprimands, disciplinary actions,
5 and other documents which relate in any way to the
6 adoption, implementation, application and
7 enforcement of Section 2.054 of the city's merit
8 system rules and regulations."

9 Do you see where it says that?

10 A. I do.

11 Q. And are you also prepared to give testimony
12 on that subject?

13 A. I am.

14 Q. Paragraph seven: "All facts, memoranda,
15 correspondence, e-mails, notes, notices, and other
16 documents which relate in any way to information
17 obtained by defendant H.H. Roberts that the
18 plaintiff and other city employees have the
19 constitutional First Amendment right of free
20 expression."

21 Do you see where it says that?

22 A. I do.

23 Q. Are you prepared to give testimony on that
24 subject as well?

25 A. I am.

1 Q. And lastly, paragraph eight: "All facts,
2 memoranda, correspondence, e-mails, notes, notices,
3 and other documents which relate in any way to
4 information obtained by defendant H.H. Roberts that
5 the plaintiff and other city employees have the
6 constitutional First Amendment right of free
7 association."

8 See where it says that?

9 A. I do.

10 Q. Are you prepared to give knowledgeable and
11 authoritative testimony --

12 A. I am.

13 Q. -- on behalf of the city on that subject as
14 well?

15 A. I am.

16 Q. Chief Roberts, I'm kind of curious, do you
17 use a computer?

18 A. I do.

19 Q. Do you use e-mails?

20 A. I do.

21 Q. Have you done that for years?

22 A. Pretty good length of time.

23 Q. Okay. And refresh my recollection. When
24 were you appointed or selected as city manager for
25 the Phenix City jurisdiction?

1 A. 2001.

2 Q. So you've been city manager for the last
3 six-plus years?

4 A. Six years and one month.

5 Q. And do you, on occasion, send and receive
6 e-mails to other department heads concerning city
7 business?

8 A. Occasionally.

9 Q. Okay. Do you recall, in connection with
10 the newspaper article that came out in September
11 2005, which is Exhibit 14 if you want to take a look
12 at that. And again, just for the Record, this is
13 that newspaper article in which Mr. Davis and a
14 number of other firefighters were interviewed and
15 quoted concerning issues affecting the city's fire
16 department.

17 Do you recall, after you were aware of that
18 newspaper article, that you sent any e-mails or
19 memoranda to the chief of the fire department or
20 anyone else in the city about this newspaper
21 article?

22 A. I don't recall right off the top of my
23 head. I would be willing to look at any that you
24 might have.

25 Q. So it's possible that e-mails could exist

1 on this subject?

2 A. Not to my knowledge. I do not remember
3 sending one.

4 Q. Have you been asked by anyone, including
5 the city attorneys in this case, to look back
6 through your e-mails to see whether or not there
7 were any e-mail communications either sent by you or
8 received by you concerning this newspaper article?

9 A. Only through the city attorneys.

10 Q. I don't understand your response.

11 A. They are the only ones that asked me to
12 review and get the criteria that y'all had
13 requested.

14 Q. Okay. But were you specifically asked to
15 look at your e-mail?

16 A. All e-mails, sir, is what I was asked to
17 look at.

18 Q. And no e-mails, as far as I know, have been
19 produced in this case. So does that mean that there
20 were no e-mails when you reviewed concerning the
21 subject of this newspaper article?

22 A. I did not recover any.

23 Q. Did you, in fact, look?

24 A. The city clerk looked, sir.

25 Q. Okay. Same questions with regard to the

1 incident of the discharge of Mr. Davis which
2 occurred in April of 2006. And I'm sure you'll
3 remember that he apparently spoke to the mayor,
4 Mayor Hardin; and as a result of that, at least in
5 part, he was a few days later terminated. You're
6 aware of that, right?

7 A. I'm aware he was terminated.

8 Q. Okay. Were there any e-mails that you sent
9 or received from anyone concerning his communication
10 with the mayor, the investigation of the situation,
11 and his eventual discharge?

12 A. Not to my knowledge.

13 Q. And have you looked to see if you had
14 received or sent any e-mails on that subject?

15 A. I have not received any. Neither have I
16 sent any.

17 Q. But have you looked to see if there were,
18 in fact, any?

19 A. As I stated earlier, the city clerk was
20 requested to gather this information, and that's the
21 point of contact that put the information together,
22 sir.

23 Q. Who is city clerk?

24 A. Martha Harris.

25 Q. And how did she look whether or not there

1 were any e-mails on these subjects?

2 A. Sir, that's a question that you would have
3 to ask her.

4 Q. You're not aware of how she did it?

5 A. No, sir, I am not.

6 Q. Did she go into your computer or hard drive
7 or did somebody else do that?

8 A. It's possible she could have had the IT
9 director to do that, sir.

10 Q. But are you specifically knowledgeable and
11 aware that she made a good faith effort to see if
12 there were any e-mails and came up with zero?

13 A. I'm confident Ms. Harris did her job.

14 Q. Do you know whether or not you had any
15 interoffice memoranda or any written papers going to
16 Chief Hunter or the HR director, Mrs. Goodwin,
17 concerning the newspaper article in September 2005
18 and the discharge of Mr. Davis in April 2006?

19 A. Not that I know of.

20 Q. So as far as you know, all of the documents
21 that are relevant to these issues in this lawsuit
22 have been produced?

23 A. All of the documents that I know of have
24 been produced to you.

25 Q. Let me invite your attention, Mr. Roberts,

1 to Exhibit 35. This is a memo from Assistant Chief
2 Hanson to Chief Hunter dated September 21, 2005, and
3 it's regarding the verbal counseling with D.E.
4 Karl -- with a K -- Taylorson. And this concerns
5 that newspaper article in September 2005 which you
6 just looked at. Have you seen this document, this
7 memo, before today?

8 A. I read this memo, yes, sir.

9 Q. Okay. Concerning the substance of this
10 memo, do you agree with the substance, or is there
11 anything in here which you would disagree with or
12 take exception to? And as I said with Chief Hunter,
13 when I ask you to look at a document, take all the
14 time you need, Mr. Roberts, before you respond to my
15 questions.

16 A. Now restate your question.

17 Q. Now that you have had a chance to read
18 through and review this memorandum, Exhibit 35, is
19 there anything contained in here that you disagree
20 with or take exception to?

21 A. No, sir.

22 Q. Okay. You'll see in the second sentence of
23 this memo it says as follows: "The statements
24 issued during this interview by personnel to the
25 news reporter were done in complete conflict of the

1 Phenix City employees merit system (Section 2.054 -
2 free speech)."

3 Do you see where it says that?

4 A. I do.

5 Q. And do you agree with that? In other
6 words, that the comments made by Mr. Davis and the
7 firefighters in that newspaper article on September
8 2005 were in complete conflict with that section of
9 the merit system rules and regulations?

10 A. I would have to agree with that.

11 Q. Do you recall if any comments or quotes
12 they made in that newspaper article were not in
13 conflict with the merit system rules and
14 regulations, Section 2.054?

15 A. I would have to reread it. I do not know
16 that answer.

17 Q. Okay. Again, it's Exhibit 14 if you want
18 to reference it, Mr. Roberts, but maybe to shorten
19 up the questioning and answering, Mr. Davis and the
20 other firefighters talked about staffing concerns in
21 the fire department, so their discussion and
22 quotations, particularly of Mr. Davis on staffing,
23 would that have been in conflict with Section 2.054
24 of the merit system rules and regulations?

25 A. Yes, sir.

1 Q. And there was also a comment by Mr. Davis,
2 and I believe other firefighters, in that newspaper
3 article about poor employee morale in the fire
4 department. Would that subject also be in conflict
5 with the merit system rules and regulations?

6 A. I feel it would.

7 Q. Now, is it your position that before a
8 firefighter can speak with the media about issues --
9 any issues affecting the fire department, that the
10 firefighter has to pursue the chain of command and
11 get prior permission before talking to the media?

12 A. Yes.

13 Q. And is that true with regard to issues of
14 staffing in the fire department, recruitment in the
15 fire department, training in the fire department,
16 adequate protective gear and apparatus in the fire
17 department, dispatching procedures, response times
18 in the fire department? Are all of those subjects
19 that the firefighter would have to get prior
20 clearance through the chain of command in the city
21 before he or she could speak on those issues to a
22 media representative?

23 A. Yes, sir.

24 Q. Other than Mr. Davis, has anyone in the
25 fire department, to your knowledge, been disciplined

1 for speaking to the media about fire department
2 issues?

3 A. I don't -- I do not know the answer.

4 MR. MCKOON: Wait a minute. I'm going to
5 object because I'm not sure he was, but just
6 for the Record.

7 Q. Let me broaden the question. Do you know
8 of any firefighters who have been disciplined for
9 speaking to the media?

10 A. Not to my knowledge, I do not.

11 Q. Later on in this Exhibit 35, the memo again
12 from Assistant Chief Hanson to Chief Hunter which
13 you have in front of you, it says in the second
14 paragraph, second sentence: "These guidelines are
15 to be followed by everyone employed by the City of
16 Phenix City."

17 Is that an accurate statement?

18 A. That is accurate.

19 Q. And then the next sentence says "he",
20 referring to Mr. Taylorson, had -- and, again, the
21 word not has been inadvertently dropped. I think we
22 had an understanding with Mr. McKoon --

23 MR. MCKOON: That is correct.

24 Q. -- that the word "not" should be inserted
25 there so it would say properly as follows: "He had

1 not received nor requested permission from any fire
2 department supervisors to speak with a member of the
3 news media concerning issues within the fire
4 department."

5 Is that an accurate statement, Mr. Roberts?

6 A. To the best of my knowledge, it is
7 accurate.

8 Q. Now, as the city manager, these are called
9 counseling forms. Do you consider this to be at
10 least a mild form of a reprimand or discipline?

11 A. It's a form that the merit system allows to
12 be put under, I believe it's a Class I, where you
13 have a counseling form and it goes into the
14 personnel folder.

15 Q. My question really is, is this sort of the
16 first stage or mild form of discipline or reprimand?

17 A. It's a very mild form.

18 Q. Would you consider it a reprimand?

19 A. I would consider it a counseling statement.

20 Q. But apparently they are inserted, as
21 Mr. Taylorson's was, in their personnel file,
22 correct?

23 A. That is -- yes, sir.

24 Q. And what is the purpose of putting it in
25 the personnel file?

1 A. That's by merit system rules and
2 regulations.

3 Q. Is it then to be used possibly for future
4 reference in the event that the same individual
5 might have some future discipline?

6 A. It could be used.

7 Q. And have these counseling forms been used
8 for further discipline down the road for the
9 individual?

10 A. I'm sure they have.

11 Q. In the last sentence here, Assistant Chief
12 Hanson is telling Chief Hunter that "I advised
13 him" -- again referring to Mr. Taylorson -- "I
14 advised him that the city would not put up with
15 another episode of speaking to the media without
16 prior approval."

17 As far as you know, is that a correct
18 statement?

19 A. From reading it, I would say it's a correct
20 statement, but I do not know the intent of Assistant
21 Chief Hanson.

22 Q. With regard to that newspaper article,
23 again in September of 2005, let me ask you this
24 question: If Mr. Davis or the other eight or nine
25 firefighters who were interviewed by the newspaper

1 reporter in that article had, in fact, requested
2 prior permission through the chain of command up to
3 your level as the city manager, would you have given
4 your okay?

5 A. I would feel -- and this is going to be an
6 explanation -- first, I would have to look at the
7 substance and if I felt like it was of concern and
8 of good intent, then I would forward it to the city
9 council.

10 Q. You would what?

11 A. Forward it to the city council. And at
12 that time, they would have the opportunity to voice
13 their concern to the city council. And then
14 probably from there, the city council would give the
15 okay or could give the okay.

16 Q. To the firefighter as to whether he could
17 speak to the media?

18 A. That is correct.

19 Q. Has that procedure ever been followed?

20 A. Not to my knowledge.

21 Q. Well, going back to this newspaper article,
22 Exhibit 14, reading through the subjects that were
23 addressed by Mr. Davis and other firefighters, they
24 covered their concerns about what they felt was
25 understaffing in the fire department and low

1 employee morale in the fire department, among other
2 issues.

3 Would those have been subjects that you would
4 have felt it was okay for them to speak to the media
5 about?

6 A. They would have been subjects that I would
7 have been happy to discuss with them and carry to
8 the council if they felt the need to go there first.

9 Q. And then I take it you would let the
10 council make that decision whether or not they would
11 be permitted to talk to the media about those
12 issues?

13 A. That is correct, yes, sir.

14 Q. Now, some of these firefighters mentioned
15 in this newspaper article that they were fearful of
16 retaliation for speaking to the media about these
17 issues. Are you aware of that?

18 A. No, sir, I'm not.

19 Q. You don't have any reason to know why
20 someone might have been fearful of retaliation?

21 A. I do not.

22 Q. In this article, Council Member Ray Bush
23 indicates that he apparently, in the past, attempted
24 to be a mediator with many of the firefighters in
25 the city about these issues of concern. Are you

1 aware of that?

2 A. I read that in the article, sir.

3 Q. Did you participate in discussions with
4 Council Member Bush about that subject?

5 A. Not to my knowledge, no, sir.

6 Q. Now, let me invite your attention to
7 Exhibit 3, which is the city grievance procedure.
8 And I know from your earlier deposition testimony
9 that you are very familiar with this section of the
10 merit system rules and regulations, which is Section
11 15.02 concerning the subject of employee complaints
12 and grievances. Is it your position that before
13 Mr. Davis and other firefighters spoke to the
14 newspaper reporter with the resulting article in
15 September 2005, that they should have first pursued
16 this grievance procedure concerning the issues that
17 they addressed?

18 A. I do.

19 Q. Did you want to add to that?

20 A. There's two forms -- two roadways that they
21 can travel.

22 Q. What are they?

23 A. One is the grievance procedure. And then,
24 of course, they have their own SOPs that they can
25 follow.

1 Q. That would be before they address the media
2 on issues. Is that what you mean?

3 A. The media or council, yes, sir.

4 Q. Or city council?

5 A. Yes, sir.

6 Q. But as I read the language in Section
7 15.023 of the merit system rules and regulations, it
8 says -- you may want to look at this subparagraph
9 D -- at the end of the grievance procedure, it says
10 "the decision of city manager shall be final and the
11 employee shall have no further rights of
12 administrative appeal."

13 Do you see where it says that?

14 A. I do.

15 Q. And is that an accurate statement that
16 you're the end of the road in terms of the grievance
17 procedure?

18 A. It is as far as the grievance procedure
19 with the fire department and police department or
20 the code enforcement officers. However, the SOPs --
21 they have the ultimate ability to get to the council
22 through SOPs, which will give them another route,
23 another step.

24 Q. Now, I'm trying to understand the scope,
25 either broad or narrow, of the grievance process.